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SUPREME COURT, U.S.

No. 80-5187

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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JOHN H. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends (Pet. 3-4) that the district court impermissibly sentenced him to consecutive sentences of imprisonment for receiving and possessing the same firearm.

1. Following a jury trial in United States District Court for the Western District of Pennsylvania, petitioner, a previously convicted felon, was convicted of unlawfully receiving a firearm, in violation of 18 U.S.C. 922(h)(1), and unlawfully possessing the same firearm, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to two-year terms of imprisonment on each count. The district court suspended execution of sentence on the receipt count and sentenced petitioner to five years' probation, to commence upon petitioner's release from custody on the possession count. The court of appeals summarily affirmed (Pet. App. A).

The evidence at trial showed that on September 14, 1978, petitioner's mother purchased a pistol in Pittsburgh, Pennsylvania, and gave it to petitioner. Thereafter, on September 26, 1978, petitioner, who had previously been convicted of a firearm felony in Pennsylvania, was confronted at a motel by Drug Enforcement agents investigating a heroin distribution network. As the agents approached, petitioner reached for the pistol, which was in his waistband. After a brief struggle, the agents subdued and arrested petitioner (Pet. App. B 2-3).

2. Whether cumulative punishments are permissible in a particular circumstance is primarily a question of legislative intent. See Whalen v. United States, No. 78-5471 (Apr. 16, 1980), slip op. 4; Simpson v. United States, 435 U.S. I, II, 11-12 (1978); Brown v. Ohio, 432 U.S. 161 (1977). See also Busic v. United States, No. 78-6020 (May 19, 1980), slip op. 4. Petitioner argues that Congress did not intend to permit consecutive sentences where, as here, a person unlawfully receives a firearm and thereafter continuously possesses the same firearm until the time of his arrest. Neither the language nor the legislative history of Sections 922(h) and 1202(a) conclusively answers this question. However, since receipt of a firearm will almost necessarily entail possession of that firearm (Scarborough v. United States, 431 U.S. 563, 579 (1977) (Stewart, J., dissenting)), we agree with petitioner

that it is unlikely that Congress intended to permit consecutive punishment in the circumstances presented here. [1/] See United States v. Larson, No. 79-5597 (5th Cir. Aug. 28, 1980); United States v. Girst, No. 77-1604 (D.C. Cir. Mar. 28, 1979). Cf. Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 U.S. 322 (1957). But see United States v. Larranaga, 614 F.2d 239 (10th Cir. 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the position we have taken herein.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1980

1/ Consecutive sentences would in our view be permissible, however, where the defendant received and transported the same firearm or where the defendant received the firearm on one occasion and, after giving up possession of it, reacquired the same firearm on another occasion. See United States v. Musgrove, 581 F.2d 406, 407 (4th Cir. 1978); cf. Woody v. United States, 258 F.2d 535 (6th Cir. 1957), aff'd by equally divided Court, 359 U.S. 118 (1959) (receipt and transportation of stolen car may be consecutively punished under Dyer Act).